LEGISLATION AND NATIONAL SECURITY SUBCOMMITTEE

Hearing on H.R. 5184,
The Competition in Contracting Act of 1984

Tuesday, March 27, 1984
10:00 a.m.
2154 Rayburn House Office Building

SCHEDULE OF WITNESSES

The Honorable Charles A. Bowsher
Comptroller General
U.S. General Accounting Office

Accompanied by: Mr. Milton J. Socolar
Special Assistant to the Comptroller General

Mr. Robert M. Gilroy
Senior Associate Director
National Security and International Affairs Division

Mr. A. G. W. Biddle
President, Computer and Communications
Industry Association (CCIA)

Accompanied by: Mr. David Cohen
Cohen and White

Mr. James W. Supica
Vice Chairman, Highway Division
The Associated General Contractors of America

Accompanied by: Mr. John Sroka
Executive Director
Occupational Division

Mr. Brian Deery
Assistant Director
Municipal Utilities Division

Mr. Vico E. Henriques
President, Computer and Business
Equipment Manufacturers Association

Mr. William A. Rose, Jr.
Chairman, Committee on Federal Procurement
of Architect and Engineering Services

Accompanied by: Mr. Philip A. Hutchinson, Jr.
Mr. William J. Birkhofer

Hearings on H.R. 5184, the Competition in Contracting Act of 1984
Legislation and National Security Subcommittee
Tuesday, March 27, 1984

THE SUBCOMMITTEE WILL COME TO ORDER. THIS HEARING IS CALLED TO CONSIDER H.R. 5184, THE COMPETITION IN CONTRACTING ACT OF 1984, WHICH WAS INTRODUCED BY CONGRESSMAN HORTON AND MYSELF.

H.R. 5184 WOULD REQUIRE AGENCIES TO USE FULL AND OPEN COMPETITION EXCEPT UNDER VERY LIMITED CIRCUMSTANCES. SPECIFICALLY, THE BILL (1) PROHIBITS AGENCIES FROM EXCLUDING ANY QUALIFIED VENDOR FROM THEIR PROCUREMENTS, (2) SEVERELY LIMITS NON-COMPETITIVE PROCUREMENTS UNLESS FULLY JUSTIFIED AND APPROVED BY HIGH-LEVEL OFFICIALS, AND (3) CREATES THE POSITION OF ADVOCATE FOR COMPETITION WITHIN EACH AGENCY WHO WILL BE RESPONSIBLE FOR ELIMINATING NON-COMPETITIVE PROCUREMENT PRACTICES.

ANOTHER MAJOR AND DISTINCTIVE PROVISION OF THE BILL ESTABLISHES A SYSTEM WHICH ALLOWS VENDORS TO APPEAL TO THE GENERAL ACCOUNTING OFFICE WHEN THEY HAVE BEEN WRONGLY EXCLUDED FROM COMPETING IN PROCUREMENTS. IN THIS REGARD, H.R. 5184 RECOGNIZES, FOR THE FIRST TIME IN STATUTE, THE GENERAL ACCOUNTING OFFICE BID PROTEST FUNCTION AND PROVIDES SPECIFIC GUIDELINES FOR HANDLING VENDOR COMPLAINTS IN A TIMELY AND EQUITABLE MANNER.

AGENCY OFFICIALS NO DOUBT WILL ASSERT THAT WE SHOULD LEAVE THINGS THE WAY THEY ARE NOW. CURRENT REGULATIONS DO REQUIRE AGENCIES TO AWARD CONTRACTS ON A COMPETITIVE BASIS. RECALCITRANT PROCUREMENT OFFICIALS WITHIN THE AGENCIES, HOWEVER, HAVE FOUND NUMEROUS WAYS TO SEVERELY LIMIT COMPETITION OR TO CIRCUMVENT THESE REQUIREMENTS ALTOGETHER. STATISTICS SHOW THAT SOLE-SOURCE PROCUREMENTS ARE ON THE RISE. MOREOVER, A LARGE PERCENTAGE OF THESE SOLE-SOURCE CONTRACTS COULD HAVE BEEN AWARDED COMPETITIVELY. THIS IS HAPPENING IN CIVILIAN AGENCIES AS WELL AS IN THE DEPARTMENT OF DEFENSE. AS A RESULT, THIS PROBLEM IS GETTING WORSE AND THERE MAY COME A TIME IN THE VERY NEAR FUTURE WHEN COMPETITIVE PROCUREMENTS BECOME AS RARE AND AS HARD TO FIND AS A BALANCED FEDERAL BUDGET.

HORROR STORIES ABOUND OF GROSS OVERPAYMENTS FOR ITEMS PURCHASED NON-COMPETITIVELY. FOR INSTANCE, THE FEDERAL GOVERNMENT RECENTLY BOUGHT A SIXTY CENT LIGHT FOR WHICH IT PAID $500 AND THE GOVERNMENT PAID $435 FOR AN ORDINARY CLAW HAMMER. THESE ARE BUT A FEW OF THE SWEETHEART DEALS THAT OCCUR DAILY THROUGHOUT THE GOVERNMENT. IT IS TIME TO PUT A STOP TO THEM. H.R. 5184 IS INTENDED TO ACCOMPLISH THIS OBJECTIVE.

TODAY, WE WILL HEAR FROM THE GENERAL ACCOUNTING OFFICE AND REPRESENTATIVES OF VENDORS WHO DO BUSINESS WITH THE GOVERNMENT. DURING A SECOND DAY OF HEARINGS, SCHEDULED FOR THURSDAY, MARCH 29, WE WILL HEAR FROM THE OFFICE OF FEDERAL PROCUREMENT POLICY, THE DEPARTMENT OF DEFENSE AND OTHERS INTERESTED IN THIS BILL.

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UNITED STATES GENERAL ACCOUNTING OFFICE

WASHINGTON, D.C. 20548

For Release on Delivery
Expected at 10 a.m.
Tuesday, March 27, 1984

STATEMENT OF

CHARLES A. BOWSHER

COMPTROLLER GENERAL

OF THE UNITED STATES

BEFORE THE

HOUSE COMMITTEE ON GOVERNMENT OPERATIONS

ON

GAO VIEWS ON H.R. 5184

Mr. Chairman and Members of the Committee:

We are pleased to be here today to comment on H.R. 5184, the Competition in Contracting Act of 1984. We generally support this legislation as containing many positive provisions for improving federal procurement, including GAO's bid protest function. There are a few areas in the bill, however, where we believe refinements would be useful. We would be glad to work with the Committee on these matters.

MAGNITUDE OF THE PROBLEM

Federal contract awards totaled $168 billion in fiscal year 1983. Awards exceeding the small purchase ceiling totaled $152 billion.[1] Of this amount, only about a third, $54.7 billion, was categorized as competitive.

Most of the dollars that federal agencies obligated were for actions under existing contracts. New contract decisions are, therefore, especially significant because they tend to limit the government to use of the same contractor when contract modifications or additions are necessary.

MANY UNWARRANTED SOLE-SOURCE DECISIONS

Our Office has examined statistical samples of new, sole-source contracts above the small purchase ceiling awarded by the Department of Defense and six major civil agencies--the National Aeronautics and Space Administration; the Veterans Administration; and the Departments of Energy, Interior, Transportation, and Health and Human Services.

The reviews showed that the Department of Defense and these major civil agencies frequently did not base their contract awards on competition to the maximum extent practical, as required. We found that the Department of Defense should have

[1]For fiscal year 1983 the small purchase ceiling was $25,000 for DOD and $10,000 for civil agencies. Currently, this ceiling is $25,000 government-wide.

competed 25 of 109 new, sole-source contracts we reviewed.[2] We estimated that DOD lost opportunities to obtain available competition on about $289 million in new fiscal year 1979 contract awards. The six civil agencies lost opportunities to obtain available competition on an estimated $148.5 million in new contract awards.[3] The dollar amounts for both defense and civil agencies represent initial contract obligations, which in some cases may be substantially increased through later contract modifications.

CAUSES OF MISSED OPPORTUNITIES TO OBTAIN COMPETITION

Why did agency officials fail to obtain competition on awards that could have been competitive? The major factors we identified included:

--Ineffective procurement planning or the failure of contracting officers to perform market research adequate to ensure that sole-source procurement was appropriate.

--Inappropriate reliance by procurement officials on the unsupported statements of agency program, technical, or higher-level officials.

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[2]DOD Loses Many Competitive Procurement Opportunities, dated July 29, 1981 (GAO/PLRD-81-45).

[3]Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting, dated April 7, 1982 (GAO/PLRD-82-40).

In addition, a general lack of commitment to competition on the part of key agency personnel was a major problem. There were also instances of overly restrictive specifications and failure to use available data packages.

H.R. 5184

H.R. 5184 proposes several important changes to address these and other problems and also provides a comprehensive statutory prescription for GAO as a bid protest forum.

To improve federal procurement, first, the bill would authorize noncompetitive procurements only under special and strictly limited circumstances. Based on our work, we have specifically recommended this type of requirement.

Second, the bill would require agencies to use advance procurement planning and market research. As previously mentioned, our reviews of defense and civil agency sole-source contracts identified ineffective procurement planning and inadequate market research as deficiencies needing correction.

Third, the bill would require the use of full and open competition, allowing all qualified sources to submit offers, but would permit the use of competitive practices that are "less rigorous than full and open competition" in several specific circumstances. This recognition of degrees of competition should increase its use and reduce the tendency toward sole-source awards in certain circumstances.

Fourth, the bill specifies the minimum information that must be included in written justifications for noncompetitive procurements. This includes the facts supporting use of the noncompetitive exception and, when appropriate, a description of the market survey conducted to locate competitive sources, or the reasons why one was not conducted, as well as the reasons for excluding any potential sources that expressed an interest in competing. In reviewing noncompetitive contract awards, we found that frequently the justifications did not include such information and reviewing officials did not have the information needed to establish the appropriateness of decisions to make awards on a sole-source basis. Competition was in fact available in a number of these instances.

Regarding GAO's bid protest function, the bill to a great extent reflects GAO's current protest procedures (4 C.F.R. part 21). There are, however, significant additions.

The bill would preclude an agency from either awarding a contract or continuing with contract performance when a protest is pending before GAO, unless the agency head or the agency's senior procurement executive determines that the vital interests of the United States will not permit awaiting GAO's decision. At present there is no requirement that contract performance be discontinued pending a protest. Although agency procurement regulations limit the authority of the contracting officer to make an award while a protest is pending, the contracting

officer is authorized to make an award in the face of a protest where he determines that the award would be advantageous to the government.

We think that limiting continuation of the government's business except where the vital interests of the United States are at stake may be too rigid a standard to apply realistically. We recognize the bill's purpose but are concerned that an unrealistic standard may ultimately result in necessary dilution of the standard through interpretive decisions. We would prefer a less rigid standard applied, perhaps, at the agency head level to assure proper consideration.

Second, the bill would require agencies to submit their report within 25 working days--and in some cases within 10 days--after receiving notice of a protest. It would further provide that if an agency report is not timely filed, GAO may consider the agency's failure to do so as an admission of the protester's contentions. GAO's current procedures state that agency reports should be submitted as expeditiously as possible within a set goal of 25 working days. A late report has no effect on the merits of the protest.

We would suggest it be made clear that the Comptroller General may grant extensions in situations where there are legitimate reasons making these time periods unreasonable.

Third, the bill would require agencies to provide protesting parties with all nonprivileged relevant documents. Existing procedures call for this information to be furnished.

In addition, the bill would provide that GAO may declare the entitlement of a successful protester to the costs of pursuing its protest as well as to its bid and proposal preparation costs. Under existing law, GAO may award bid and proposal preparation costs only.

These proposed changes to the existing protest system would clearly enhance GAO's ability to provide protesters with meaningful relief. Thus, the bill would help assure that procurements are awarded in accordance with the requirements of law. In keeping with the bill's enhancement of GAO as a protest forum we would want to expedite our processing of protest cases. After enactment we may find that we need to augment our staff to meet increased demands placed upon us in meeting the bill's underlying objectives.

We should point out that the bill's tightened competition requirements together with stricter protest requirements could cause delay in the government procurement programs and attendant increase in costs. Whether contracting agencies should be required to accept the resulting delays in their procurement programs and any increased costs is a matter we leave for the Congress to consider.

There are several other provisions in the bill which we think should be refined or changed. The bill would provide that interested parties may file protests with the General Services Administration Board of Contract Appeals concerning procurements made under section 111 of the Federal Property and Administrative Services Act of 1949. This would be in addition to a right to protest to our Office. Procurements under section 111 of the Act for automatic data processing equipment (ADPE) are, like all other procurements, subject to the provisions of this bill. Establishing additional protest jurisdiction in the Board could therefore result in inconsistent rulings from the Board and from GAO. While ADPE procurements are also subject to section 111 of the Federal Property and Administrative Services Act, they do not necessarily concern the technical aspects of the ADPE being purchased. Most often they concern the same procurement-related issues that affect all acquisitions. We see no reason to treat ADPE protests differently and recommend this provision be deleted.

In addition, circumstances authorizing the use of noncompetitive practices need to be better defined. Under the bill agencies would likely justify the need for noncompetitive follow-on contracts under section 202 (c)(1)(A) on the ground that the property or services required are available from only one source. The bill should specify the conditions under which such follow-on awards are appropriate.

Our specific suggestion relating to follow-on procurements as well as several additional suggestions intended to define and limit the important exception to the use of competition provided by section 202(c)(1)(A) are set forth in the attachment to this statement.

Section 202(c)(4) of the bill provides that "In no case shall an executive agency be authorized to engage in noncompetitive procurement on the basis of the lack of advance planning or concerns related to the amount of funds available to the agency for procurement functions." Although we have found that agencies generally need to improve their advance procurement planning efforts, we believe that for at least some procurements this provision would be too costly and burdensome to the government. Therefore, we suggest the provision be revised to require instead a report to the Committee in each case where the lack of advance planning caused a noncompetitive procurement. The report should include the steps taken to avoid such problems in the future.

Also, the bill should provide that failure to obligate funds by reason of a pending protest shall not cause such funds to lapse if the protest is ultimately resolved in favor of the agency position.

Subsection (a) of section 204 of the bill states in part that protests concerning violations of this title shall be given priority consideration by GAO. We recommend that this provision

be modified to give GAO some discretion to determine how best to handle its case load.

Technical concerns we have regarding specific provisions of the bill are shown in the attachment. This concludes my prepared statement. I will be happy to address any questions you may have.

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ADDITIONAL SUGGESTIONS RELATING TO H.R. 5184

The Committee report should make clear that the use of noncompetitive practices under section 202(c)(1)(A) for follow-on contracts covers the avoidance of (1) unacceptable delays in accomplishing the agency's mission objectives or (2) substantial duplication of costs to the government for the property or service being procured, which cannot be expected to be recovered through competition.

The Committee report accompanying the bill should also include an explanation along the following lines to define several other important bases for single-source availability determinations under 202(c)(1)(A):

--The agency head determines that it is in the public interest to procure technical equipment or parts which require standardization and interchangeability where only one source can provide such standardization and interchangeability and it is neither practical nor economical to establish more than one source. Determinations under this paragraph shall not be made for the initial procurement of equipment and spare parts which ultimately will be standardized or for the purpose of arbitrarily selecting the equipment of certain suppliers.

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--Data, such as drawings or other specifications, needed for competition are not available and there is no alternative way of obtaining competition, such as through redescribing requirements in terms of function or performance required. However, agencies are responsible for avoiding such noncompetitive situations by obtaining adequate data wherever feasible.

--There is existing equipment and only one source can satisfy the government's legitimate need for an item compatible with it. If other sources can modify or adjust their products to produce acceptable items, they must be given the opportunity to compete.

We also have some concerns about the wording of section 202(c)(5) relating to spare parts. We suggest that the words "in the parts or their manufacture" be deleted because a firm's proprietary interest would relate to the data needed by the government for competition rather than the parts themselves.

Section 202(j)(1)(D) provides that full and open competition means "the contract is entered into only after the executive agency has received, from qualified sources, a sufficient number of sealed bids or competitive proposals to ensure that the government's requirements are filled at the lowest possible price given the nature of the product or service being

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acquired." This is a very strict standard and could necessitate repeated resolicitations to achieve full and open competition as defined. We suggest that the words "a fair and reasonable" be substituted for "the lowest possible" price.

In addition, as part of this same definition, subsection (j)(1)(A)(iii) states that each bid or proposal must be "fully evaluated" in the selection of a contract recipient. We are uncertain whether this term would needlessly add to agency administrative burdens and we suggest that the term "fairly evaluated" be used instead.

Section 203 of the bill does not exempt agencies from publishing a preaward notice in The Commerce Business Daily inviting bids or proposals under certain circumstances that we believe should be exempted. This includes section 202(c)(1)(C) and (D) under which noncompetitive practices would be authorized based on international agreements, procurements directed by foreign governments reimbursing the agency for their cost, and statutes requiring procurement from specified sources. Current law does not require publishing notices inviting competitive offers in these situations when noncompetitive awards are determined to be necessary (see Public Law 98-72).

This type of notice is primarily intended as a final check on the marketplace to identify potential competitors that have not yet been solicited either (1) in competitive situations or (2) when agency officials claim that a noncompetitive procurement is necessary because the property or service required

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are available from only one source (section 202(c)(1)(A)). Publishing such notices in all other noncompetitive situations is burdensome and most likely not worthwhile. The Committee may also wish to consider exempting procurements made by an order placed under an existing contract, including orders for perishable subsistence supplies, as currently provided by Public Law 98-72.

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CCIA

STATEMENT OF

"Jack"

A.G.W. BIDDLE

PRESIDENT

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

RELATIVE TO H.R. 5184

BEFORE THE

SUBCOMMITTEE ON LEGISLATION AND NATIONAL SECURITY

OF THE

COMMITTEE ON GOVERNMENT OPERATIONS

U. S. HOUSE OF REPRESENTATIVES

March 27, 1984

Computer & Communications Industry Association 1500 Wilson Boulevard Suite 512 Arlington, Virginia 22209 (703) 524-1360

Mr. Chairman, members of the Subcommittee, it is a privilege to present our Association's views on the Competition in Contracting Act, H.R. 5184. In recent years, this Subcommittee has considered numerous bills to improve the federal procurement system. Important as these bills have been, none are as vital to meaningful procurement reform as H.R. 5184. Quite simply, this legislation contains the most effective tools yet proposed to increase competition in federal procurements.

Increasing competition for Government contracts is vital to the interests of our members. CCIA is an association of over 70 member companies which represent all facets of the computer and communications industries. Our members' combined annual revenues currently exceed $30 billion, of which $12 billion represents computer and communications equipment and services. Many of our members derive significant income from successful competition in the federal market.

Today, the ability to compete for government contracts is seriously threatened by a massive wave of noncompetitive procurements. The Office of Federal Procurement Policy has reported that agencies made at least $87 billion in noncompetitive awards during FY 83, $56 billion of this was for initial, not follow-on, contracts. In recent years, some procuring activities have awarded as much as 70 to 90% of their contracts on a noncompetitive basis. The GAO has reported that between FY 74 and FY 81, the Department of Defense procured most of its goods and services without competition. In FY 74, GAO found that 56.4% of DOD procurements were noncompetitive. In FY 81, 63.4% of DOD's procurements were performed without competition.

There can be no dispute that noncompetitive procurements significantly increase the Government's costs and the federal deficit, which is rapidly approaching runaway proportions. President Reagan acknowledged, in his August 11, 1983 memo to federal agencies that, "Numerous examples of waste and exorbitant costs due to the lack of competition have been detailed by the Congress and the press..." To cite but one example of the cost savings obtained through competition, the Army's decision to procure a single tractor on a competitive basis achieved cost savings in that procurement alone of 43% or approximately $450,000. On a larger scale, Public Law 89-306, which has strengthened competitive procedures in ADP procurements, has saved the Government billions of dollars since its passage in 1965.

Despite these clear benefits to the Government, there is no indication that agencies will reduce the volume of noncompetitive procurement without action by Congress. H.R. 5184 supplies the key statutory provisions which will force an increase in competition. H.R. 5184's requirements to use full and open competition, and its establishment of a more effective bid protest system aim squarely at some of the key causes of noncompetitive procurement.

H.R. 5184's requirement for full and open competition plugs a vast loophole that permits considerable procurement abuses. By requiring full and open competition, H.R. 5184 will prevent agencies from describing procurements as fully competitive simply because two bids or proposals are submitted. Such procurements

are often smoke screens which conceal the fact that restrictive specifications have precluded numerous sources from bidding. We suggest that the subcommittee tighten the bill even further by making clear that full and open competition requires agencies not only to receive but also to include in the competitive range "a sufficient number of bids or proposals to insure that the Government obtains the lowest possible price."

We are also encouraged by the provisions of H.R. 5184 which remove many of the present restrictions that prevent agencies from using competitive negotiation procedures. Competitive negotiation is the only rational method of procuring high technology products. We believe that H.R. 5184 should remove all statutory preferences favoring sealed bidding over competitive negotiation. It does not matter if an agency uses sealed bids or competitive negotiation so long as the procurement is competitive. H.R. 5184 improves the law by virtually eliminating the current statutory preference for competitive sealed bidding.

I would like to turn now to Section 204 which will strengthen the procurement protest system. Our association believes that this is the single, most important section of H.R. 5184, and the one most essential to the attainment of the bill's objectives. If this Section is deleted or weakened, we will probably never see significant increases in competitive procurements.

The generally cited causes for noncompetitive procurement--lack of advance planning, lack of market research, and the rush to spend fiscal year-end money--have considerable validity. But

a more significant cause for lack of competition is that there is no effective remedy to prevent or correct noncompetitive procurements. There is no penalty when an agency improperly procures sole source. Indeed, the agency officials who participate in such a procurement may receive points within their agency for "getting the boss what he wants."

Unless and until agency officials learn that noncompetitive procurement means contract cancellation, personal embarrassment, and the necessity to reprocure correctly, there will be little incentive to take the extra steps to compete a procurement and save the taxpayers' dollars.

You do not have to look very far to find an effective police force to stop noncompetitive procurement. The companies who compete in the federal marketplace have a vital interest in preventing their competitors from obtaining sole source awards. These companies are invariably "on the scene" when an agency attempts to slip a contract to a preferred vendor. If the companies who compete for federal business could obtain effective relief, they could force agencies to use competitive procedures. Competition would become a fact, not a piously mouthed goal.

At the present time there is no effective remedy against lack of competition in federal procurements. Almost by default, the General Accounting Office's bid protest procedure has become the major hope for companies who have unfairly lost Government contracts. However, the GAO is hampered by severe institutional limitations which preclude it from acting as an aggressive

enforcer of competitive policies. This Subcommittee should understand from the outset that the lawyers who decide protests operate in a much different manner than the GAO auditors who perform investigations at the request of Congress. GAO lawyers act like judges--not investigators. In fact, GAO does not conduct investigations to establish the validity of a bid protester's claims. Easco Tools, Inc., et al., B-212783 et al., January 19, 1984, 84-1 CPD ¶83. Radix II, Inc., et al., B-212267 et al., January 24, 1984, 84-1 CPD ¶113.

Thus, without any independent fact-finding, GAO's protest decisions must rely on the facts which the agency chooses to disclose. Not surprisingly, agency protest reports are often highly selective. And the protester's inability to force disclosure of relevant facts is compounded by procedural obstacles imposed by GAO. For example, GAO has ruled consistently that the protester has the burden of proof. If the record consists of conflicting statements of the protester and the contracting agency, GAO will rule that the protester has failed to carry its burden of proof. Control Data Corporation, B-209166.2, December 27, 1983, 84-1 CPD ¶21 at 15.

Think about that for a minute. Except for the Freedom of Information Act, the protester has no way to get the facts which will counter an agency assertion that the protest is wrong. GAO procedures do not provide for independent investigation, compulsory production of all relevant documents, the examination of witnesses under oath, or any of the other established procedures which have long been recognized as fundamental

prerequisites of ojective fact-finding. Under GAO procedures, an agency need only deny that a protester's statement of facts is correct. In nine cases out of ten, the agency's denial will carry the day.

To make matters worse, a protester is required not only to counter agency assertions of fact, but to overcome them with overwhelming evidence. For example, a protester who challenges the agency's statement of its requirements must somehow come up with "clear evidence" that the agency's specifications were "arbitrary or otherwise unreasonable." Radix II, Inc., et al., B-2122678 et al., January 24, 1984, 84-1 CPD ¶113 at 3. A protester who argues that the agency should maximize competition by splitting its requirement must provide a "clear showing" that the agency's contrary determination lacks a reasonable basis. MASSTOR Systems Corporation, B-211240, December 27, 1983, 84-1 CPD ¶23 at 2. A protester who claims that the agency failed to maximize competition by conducting sufficient negotiations must present a clear showing that the agency's actions were without reasonable basis, Control Data Corporation, B-209166.2, December 27, 1983, 84-1 CPD ¶21 at 9, even though the agency's conduct produced a sole source.

This high burden of proof, and the fact that agencies can win protests with barely supported denials of the protester's statements, make the protest remedy virtually worthless. In FY 83, GAO decided 1,377 protests. Only 62 protests were sustained. In other words, the protester won about 4% of the decided cases. In FY 82, the GAO decided 1,091 cases, and

sustained 83, so protesters won about 7% of the decided cases.

But the most frustrating fact is not that protesters win so few cases. The basic problem is that protests rarely produce corrective action even when the protester overcomes the enormous burdens imposed by GAO. Consider the case of Amdahl and ViON, which successfully protested an award to IBM. The GAO sustained the protest, and ruled that the procuring agency should issue a new round of best and finals, and terminate IBM's contract if a more advantageous offer was received.

This apparent victory for competitive procurement dissolved after the parties moved for reconsideration. Although the initial protest had been decided in less than 30 days, GAO took over five months to decide the requests for reconsideration. The Army completed installation of the procured computer immediately after the GAO issued its first decision. The GAO later ruled that the cost of terminating the contract was too high, and withdrew its recommendation for effective action.

Consider what happened to PhilCon Corp. PhilCon successfully challenged the Navy's use of restrictive specifications in a contract for heat distribution systems. The GAO sustained PhilCon's protests on April 12, 1983 (PhilCon Corp., B-206641 et seq., April 12, 1983, 83-1 CPD ¶380) and recommended that the Navy cancel the protested soliciations and resolicit its requirements. The Navy requested reconsideration. It had awarded the contract notwithstanding PhilCon's protest. It had also performed most of the contract while the protest was pending. Once again, the GAO withdrew its

recommendation for corrective action. PhilCon Corp.--Reconsideration, B-206641. 2 et seq., December 30, 1983, 84-1 CPD ¶42.

These cases highlight a hideous problem with GAO protests. They rarely accomplish anything. GAO recommended contract cancellation or termination in only 14 cases during FY 83. In other words, the protester obtained meaningful relief in only 1% of all decided cases. Moreover, even if we exclude from the number of decided cases the protests which were summarily dismissed, GAO recommended contract termination or cancellation in only 2% of the remaining cases. The same result applies if we exclude the protests reviewed and decided before award.

These examples--and there are countless others--point out a cardinal failing of the bid protest process. GAO has no power to stop a contract award or contract performance while a protest is pending. As a result, agencies usually proceed with their contracts, knowing that they will preclude any possibility of relief simply by delaying the protest process. Moreover, long delays at GAO are not uncommon. One of our members has had a protest pending at GAO for over a year. The reconsideration process in the PhilCon and Amdahl cases took over five months each. GAO's own statistics show that the average time required to decide a protest was 132 days in FY 83. This statistic can be deceiving because an agency intent on delay can block the process for a longer period simply by delaying preparation of a protest report. The delay alone will insure a meaningless decision from GAO.

To call bid protests a remedy stretches this term far beyond its normal meaning. As it now functions the protest process is not a remedy; it is a joke designed to place a thin veneer of fairness on waste, abuse and noncompetitive awards. H.R. 5184 contains several significant provisions which will add some muscle to a process that now corrects only the most egregious, isolated abuses. H.R. 5184 will make it more difficult for an agency to award or perform a contract pending protest. The bill will also prevent agencies from stalling the protest process by refusing to provide a protest report. And the bill will strengthen the Comptroller General's authority to recommend relief.

These provisions will significantly improve the current bid protest procedures. However, we have serious questions as to whether GAO should be the sole forum for deciding bid protests. Even after H.R. 5184 is passed, GAO will still not have sufficient tools to obtain the facts or enforce its decisions. Our concern is especially acute in regard to automated data processing procurements under Public Law 89-306. ADP procurements present numerous unique and highly technical problems. Experience has shown that in order to discharge its statutory responsibilities under the Brooks Act, GSA needs a vehicle which will allow it to identify abuses of competitive procedures and expeditiously obtain the facts.

Because of GSA's unique responsibilities, we strongly support the provisions of H.R. 5184 which will give the GSA Board of Contract Appeals authority to decide bid protests involving procurements conducted under the Brooks Act. The Board is

capable of providing effective relief under GSA's existing powers to delegate procurement authority. The Board's streamlined procedures should allow decision of protests in less than 50 days. The Board has the power, which GAO lacks, to stop procurements, and thereby preserve the right to obtain meaningful relief. The GSA Board is also able to hold hearings and force production of evidence so that protesters will not have to discharge impossible burdens of proof.

By establishing the GSA Board role as an alternative forum for protests involving Brooks Act procurements, H.R. 5184 still allows GAO to hear numerous protests involving ADP acquisitions. For example, many ADP procurements have been excluded from the Brooks Act under the Warner Amendment. GAO will still have significant protest work in those procurements alone. And, there is no provision in H.R. 5184 which precludes any protester from bringing his case to GAO instead of the GSA Board.

The establishment of a limited bid protest remedy in the GSA Board of Contract Appeals will provide benefits for the entire procurement process. It will give us working experience with an alternate forum for deciding bid protest cases. If the GAO is unable, even as strengthened, to provide effective relief, we will have a working alternative which can be expanded as necessary to enforce requirements for competition in federal procurements.

Much work remains before we will obtain completely effective remedies. For example, the Claims Court and the U. S. District

Court also have the power to decide bid protest type cases. However, recent decisions by the Claims Court make meaningful judicial relief virtually impossible. The Claims Court is now the exclusive forum for preaward protest cases. The court has ruled that it has no jurisdiction over certain suits involving abuse of the competitive process, such as the use of restrictive specifications. As a result, there is now no court which can hear a preaward challenge to restrictive specifications. Congress must remedy this unfortunate situation as soon as possible.

H.R. 5184 goes a long way towards establishing the first workable set of remedies which will prevent noncompetitive procurements. As agencies gradually learn that there are sanctions for improper, noncompetitive procurements, they will comply with the law and increase competition in federal procurement. For this reason alone, H.R. 5184 is the most significant procurement legislation in recent years. It deserves wide support, and quick approval.

GOVERNMENT CLOSEUP

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No Relief In Sight

BY JACK ROBERTSON

WASHINGTON — It's bad enough to lose big government disputed bids when Uncle Sam refuses to hear your side, but it's enough to make grown corporate officers cry when the General Accounting Office upholds a bid protest and you still lose.

Remember the GAO decision overruling an Army award to IBM for a model 3081-D computer in a dispute over whether the computer was still "in current production" — a mandatory condition of the bid? Vion Corp. and Amdahl Corp., both bidding then-current production computers, charged IBM had withdrawn its 3081-D system, not only from the commercial market, but in the firm's own notification to GSA that the system was no longer available.

GAO ruled that the Army should amend its RFP to clarify whether it would accept the IBM 3081-D or equivalent era computer. The Army asked the auditor to reconsider, however, noting that the disputed IBM computer had been installed (immediately after award) and a new round of bidding would cost the government an extra $300,000 due to disruption.

GAO upheld its original ruling but agreed "The costs of the resulting disruption (in a new round of bidding) would be out of proportion to either the benefits received or the identifiable competitive harm."

Vion and Amdahl, which bid in good faith and were upheld in their protest, might question GAO's view of negligible "competitive harm" by allowing the improper Army award to stand. True, these firms are likely to bid again on federal procurements, especially Vion, which has no other market, acting as National Advanced Systems' federal marketing agent. Both contenders took it on the chin for heavy marketing and design expenses, though, and deserve better than seeing legitimate relief ignored simply for expediency.

GAO IN AN EARLIER OPINION ruled "It has been our position that the public interest in strictly maintaining the competitive bidding procedures required by law outweigh any pecuniary advantage the government might gain in a particular case by a violation of the rules."

Too bad this wasn't GAO's position this time.

We have already reported the hollow protest victory of Four Phase Systems when GAO, after upholding the complaint, allowed the FAA computer award to Small Business Systems because reopening the procurement would cost the government too much money.

GAO last year upheld a protest by Cray Research and Systems Development Corp. that a $16 million award by the National Oceanic & Atmospheric Administration was wrongly awarded to Control Data Corp. GAO agreed that CDC had failed to certify unconditionally that its computers would meet a 95 per cent minimum efficiency standard, but said if the installed CDC systems later met the required performance level, the systems could remain.

CMI Corp. was upheld by GAO in its protest that the Agriculture Department did a "mock evaluation" to award essentially a $186,925 sole-source contract to IBM for its Model 4331-J11 computer from the firm's GSA data processing schedule contract, without allowing CMI to bid.

Agriculture followed the rules to put a notice in the Commerce Business Daily that the agency intended to award IBM the contract from its GSA contract. When CMI responded that the firm could supply a comparable computer for $60,000 less, however, Agriculture arbitrarily raised many of the cost factors in the firm's notice and went ahead to place the order to IBM anyway.

ALTHOUGH GAO CONCURRED that Agriculture should have run a competitive bid, the auditor noted that the IBM computer already was installed at Agriculture's Human Nutrition Research Center "and at this late date, no corrective action can be taken."

Frankly, this mild slap-on-the-wrist does nothing to enforce federal rules against placing sole-source orders from GSA schedule contracts when competitive sources of supply exist. Agencies know if they install the sole-source computer, and then stall the resulting GAO protest long enough, they can keep the system, no matter what GAO ultimately decides.

It is far better to make procurement rules stick and, when agencies play loose with the regulations, to make them pay the resulting budget penalty to set the procurement right. Nothing gets agency attention like having to cough up scarce dollars to redo a procurement that broke the rules.

Varian Associates last year successfully protested an Army award to ITT at a higher price for 188 klystron tubes, only 3 days after the Army gave ITT an order for 235 tubes. ITT had barely edged out Varian in the original bid for 235 tubes but was higher-priced for follow-ons. In the quick follow-on award to ITT, the Army renegotiated the original contract to re-price all 423 tubes to allow ITT to have the lowest price for both portions of the procurement.

GAO agreed with Varian that this was sole-source negotiation with ITT after-the-fact, and ruled that the Army should seek new competitive bids.

THE ARMY APPEALED that such a rebid would cost the government over $200,000 and, to save this money, GAO agreed to allow the improper procurement to stand.

Such economies may be far more expensive to Uncle Sam in the long run if protesters find they cannot even get relief when they are upheld in disputed bids. This will only drive more firms out of the market and lower the already declining levels of competition in federal bids.

Statement

by the

Committee on Federal Procurement of

Architectural/Engineering Services

to

House Committee on Government Operations

Concerning

H.R. 5184, Competition in Contracting Act of 1984

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Mr. Chairman, my name is William A. Rose, Jr. I am an architect from White Plains, New York and Chairman of the Committee on Federal Procurement of Architectural and Engineering Services. The Committee represents the views of the

American Congress on Surveying and Mapping
American Consulting Engineers Council
American Institute of Architects
American Society of Civil Engineers
ARTBA Planning and Design Division and
National Society of Professional Engineers.

The societies, in turn, represent the vast majority of America's practicing architects, engineers and surveyors.

My purpose in appearing before you today is to present our position on H.R. 5184, the Competition in Contracting Act of 1984. We support this legislation and commend you, Chairman Brooks and Congressman Horton, for your commitment to full and open competition in the Federal market place.

We are especially pleased that the term "full and open competition," as used in Section 202 of the bill, is defined to include the procedures now followed by all Federal agencies in procuring architect/engineer (A/E) services. The A/E procurement procedures required by P.L. 92-582 and P.L. 97-214, the Military Construction Codification Act, are highly competitive and strongly supported by the practitioners we represent. Mr. Chairman, as the principal draftsman of the Federal A/E procurement law it must be a source of satisfaction to know that many, many millions of dollars worth of Federal projects have

been designed by architects and engineers who competed and were selected in accordance with the Brooks Act. I should add that the vast number of our members are small business. As such, they are especially appreciative of opportunities they have had to compete for Federal work since the Brooks Act was enacted.

We are concerned however that application of the Brooks Act has been misconstrued by some agencies. For example, the General Accounting Office (Ninnenan Engineering Reconsideration, B-184770, March 9, 1977) ruled that certain services are not covered by the Brooks Act. It ruled that surveying and mapping services specifically, and other A/E related services not incidential to construction projects, were not covered by the Act.

The construction issue has since been resolved by a subsequent GAO ruling, but the surveying and mapping issue is still clouded. Congress has recently helped clarify this matter (see H. Rept. 97-612, S. Rept. 97-474 at page 19, and P.L. 98-63) and the Senate, during consideration of its version of the Competition in Contracting Act, S. 338, provided much needed expression of Congressional intent. We urge the Committee to provide similar clarification of this important matter during its deliberations on H.R. 5184.

We also support the "Procurement Protest System" set forth in Section 204 of H.R. 5184. These procedures should assure that: the Comptroller General handles protests expeditiously; contracting agencies do not press on with an award in the face of a protest unless there are compelling circumstances; and the

costs of pursuing a successful protest are reimbursed.

We do have some concerns which, in our view, would promote competition in A/E contracting. These concerns may be beyond the scope of the bill before you, but they are related to the issue of competition and, therefore, I shall mention them briefly.

Small Business Set-Asides ... Since most of our members are small business we see little merit in a set-aside program for our professions. Our basic position is that the best A/E should be selected for the job at hand using Brooks Act procedures. Typically, very small jobs can best be handled by small firms, while larger firms are often more qualified to handle bigger projects. We recognize and support the government's desire to assist small firms. But we believe programs designed for the overall benefit of small business may not be applicable to every segment of small business. In fact, Congress has recognized that it is inappropriate to set aside all DOD A/E contracts for small business and has directed that contracts over $85,000 should be open to competition among all A/E firms. Our general procurement laws and regulations should recognize that there may be situations where competition would not be promoted, nor would it be in the overall public interest, to impose a broad rule to a particular

business group or profession. For example, if the "rule of two" was applied to all A/E contracts, every contract would go to a small business A/E contractor yet in all likelihood truly small A/E firms would not be helped at all and some highly qualified A/E firms would be totally excluded from the opportunity to compete for government business. Mr. Chairman, we are encouraged that you have called the "rule of two" inequity to the attention of OMB Director Stockman. Hopefully, the Federal Acquisition Regulations (FAR) will be modified to exclude the "rule of two" requirement.

Federal Acquisition Regulation ... We know that a great deal of effort has been put forth to simplify Federal procurement regulations. The goal is a worthy one: cut down the volume of and conflict between Federal procurement regulations by providing one, simplified body of procurement rules, applicable government-wide. We regret to say we think the effort is going awry. The Federal Acquisition Regulation is scheduled to go into effect April 1. But in addition to the FAR each agency is planning to issue supplemental regulations. We suspect when the whole effort is evaluated the FAR plus supplements will be equal to or greater than

the body of regulations that were to be simplified. We can only report that our members do not think there has been a simplication, based upon what we have seen so far.

Office of Federal Procurement Policy ... We have been a strong supporter of OFPP since its inception. Sometimes we have had disagreements with OFPP, but we have always had a fair hearing and an open door. This has been particularly true under the leadership of the current Administrator, Don Sowle. We believe OFPP should be more aggressive to assure that inconsistencies are not permitted to creep into the procurement process. In our area of expertise we see inconsistencies from time to time. We report these to OFPP. We sense a reticence on the part of OFPP to exercise its policy role. Perhaps this is due to other priorities and a limited staff. Nevertheless, we believe that when there is a conflict between agency practices, OFPP must step in and reestablish the course otherwise the authority and purpose of the office will be quickly eroded. It would be helpful if this Committee would encourage OFPP to exert its policy authority when inconsistencies or deviations are brought to its attention.

Mr. Chairman, on behalf of America's practicing architects, engineers and surveyors, thank you for your consideration and the opportunity to present these views.